Labor & Employment Law Update

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Legislation And Admininistration Actions

DOL Considers Changes in FMLA Serious Health Condition Definition. The Dept. of Labor has released new FMLA forms and is soliciting comments regarding updating FMLA regulations as to what constitutes a Serious Health Condition qualifying for FMLA eligibility. DOL is specifically asking for comments about challenges posed by employees using FMLA leave intermittently; the timeframe an employer must offer an employee to get a doctor's note; and whether the department should revise regulations to codify FMLA interpretations it has addressed in several opinion letter since 2018. This commentary will not include FFCRA issues.

***SBDA and Treasury Announces Intent to Prosecute PPP Violations and Makes PPP Loan Information Public – Anyone Could Report a Suspected Violation*.** Federal agencies have already pursued actions against those obtaining PPP loans by fraud. Now the SBDA and Treasury Dept. have announced that they will be auditing PPP loans, especially larger than $2 million. (The majority of loans average only $150,000.) "Intense scrutiny" will be given where there is a concern about misuse of the loans. The Treasury Department has created searchable data on individual loans, including the names of recipient businesses, approximate loan sizes, and the number of jobs supported by each PPP loan so anyone in the public, including other businesses, can view this and scrutinize for misuse. The Dept. of Justice is creating a website for reports by whistleblowers both inside and outside the recipient companies.

Virginia Implements First COVID-19 Safety Regulations. In the absence of Federal action, Virginia has enacted legally enforceable safety rules regarding employers' requirements to provide PPE protection, sanitization, workspace distancing, and protocols for when employees test positive for COVID-19. There are no OSHA or other Federal COVID specific rules. The Federal agencies have issued unenforceable guidances, which some employers have believed can be ignored. (There are some pre-existing specific industry OSHA regulations on ventilation, respirators and health protection which have been used to address COVID concerns.) Members of both parties in Congress have expressed concern about this Federal inaction (see June 2020 Update), so far without results. So states are starting to act. Virginia is the first, but expect others to follow.

***NLRB Advice Memo – COVID-19*.** The National Labor Relations Board has issued an advice memo stating that employer can alter job conditions in the COVID-19 emergency without first getting approval from their employees' unions, as is otherwise required. However, the employer must then bargain over the changes "within a reasonable time."

Litigation

U.S. SUPREME COURT

The U.S. Supreme Court ruled on employment cases involving religion.

Our Lady of Guadalupe School v. Morrissey-Berru expands and clarifies Ecclesiastic Exemption. The First Amendment prohibits the government, including courts, from interfering with a religious institution's decisions about faith-based, "Ecclesiastic" or "Ministerial" employees. Thus, those who fit the "Ministerial Exception" cannot file cases under the standard employment laws. Non-Ministerial employees, those without "important religious functions," are regular employees and can sue under the standard laws. A religiously-affiliated school is a religious institution. A long-litigated issue is whether teachers are just regular teachers of academic subjects or "Ministerial." In this case, two discharged teachers sued. One for age discrimination under the ADEA; the other for FMLA and ADA disability discrimination. The 9th Circuit ruled that they were not Ministerial since they had no "Minister" title nor cleric training and the majority of their time was purely academic teaching. However, the U.S. Supreme Court ruled that the test is not formal titles or seminary training. Instead, it is whether the teachers also had "faith-based" functions as part of the job, "educating and forming students in the faith." The school had great latitude to assign any degree of religious educational component to a teacher's interactions with students and make the determination of who fit the Ministerial Exception. Thus, the Court deferred to the school's classifying the teachers as Ministerial.

Court Upheld Administration's Birth Control Exemptions in Little Sisters of the Poor Home v. Pennsylvania and in Trump, at el v. Pennsylvania. The Trump Administration issued exemptions from the ACA for employers with religious or moral objections to providing contraceptive coverage under employee health insurance. The exemptions were challenged by individuals and states, including Pennsylvania, which obtained injunctions against the rule. The U.S. Supreme Court consolidated two of these cases and, in a strong 7 to 2 decision, ruled that the Dept. of Health and Human Services under the ACA had the "discretion to define preventative care and screening and to create religious and moral exemptions." This was not a ruling on the merits of the regulation itself. Instead, it was a ruling as to whether the ACA gave DHHS the authority to issue such a rule and whether the Department acted within that scope. Justice Kagan, who joined the majority, also opined that the substance of the rule could still be challenged on a variety of other grounds.

MOST UNUSUAL CASE – CONSEQUENCES OF VIRTUAL COURT PROCEEDINGS

Bass v. American Assoc. of Political Consultants – No Decision – Just a Proceeding. As with many courts where COVID-19 has eliminated in-person proceedings, the U.S. Supreme Court decided to hold its last 10 oral arguments by teleconference. The attorneys are not in the building. The Justices are not together on the bench, and can be virtually anywhere. Also, unlimited by the courtroom space, far more press and public can listen in. During the oral argument of this case, the unmuted line of a Justice broadcast the unmistakable sound of a flushing toilet, for a number of seconds, to a nation of listeners. The presenting attorney didn't miss a beat and continued the argument. No one commented. The proceeding continued. A diligent press and curious public have been unable to identify which Justice was engaging in a "constitutional rite."

LABOR RELATIONS

NLRB Modifies Standard on Employee's Abusive, Offensive Comments. In *Re General Motors LLC* (2020) the NLRB has changed the often confusing standard for whether an employee can be disciplined or discharged for making abusive or offensive statements, including profane racial or sexually offensive

remarks under a claim of "protected concerted activity." The National Labor Relations Board has recognized the often adversarial nature of labor relations and allows latitude for impulsive, antagonistic, statements with some heat and invective as "protected activity." However, this shield has been used to claim that overt racist, sexist or other overtly discriminatory remarks made by employees have a protection. The *General Motors* decision has limited this, removing such comments from protection. The NLRB opinion stated that it "ends this unwarranted protection, eliminating the conflict between NLRA and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed." The test is now the same as for all other alleged protected activity. Would the employer have disciplined or discharged the employee for the abuse of language even if the protected activity did not occur?

DISCRIMINATION

DISABILITY

VA Drives Wrong Way Down Road to Accommodation. A disabled Veteran's Administration employee and veteran requested a better vehicle to transport clients in his role as VA Case Manager for the disabled Vets in the Milwaukee VA district. The assigned van was in poor shape and aggravated his leg condition. His request for this accommodation went unanswered for a half year. Then the VA gave him an old van in **worse** condition, including a cracked windshield and no working back brakes, creating more problems. He was required to use this "materially worse" vehicle for another year, until a non-disabled employee complained that her van rode rough and was jerking. The VA promptly gave her a new vehicle, and then gave all Case Managers new vans. The disabled employee filed a Rehabilitation Act case and the Court found a very plausible case of lack of good faith, unreasonable delay in accommodation response and failure to engage in the interactive process. *McCray v. Robert Wilkie* (7th Cir. 2020).

Fair Labor Standards Act – Wages & Hours

"Everyone Else Does It" is Not a Defense. A hotel restaurant's head chef won a million dollar verdict. The court ruled that he did not qualify as an exempt executive under the FLSA. He worked between 70 and 84 hours per week for over three years without receiving any overtime pay. The hotel claimed that it was an "industry standard" for head chefs to be salaried exempt – everyone operates that way. The court rejected this, finding the chef's duties were overwhelmingly cooking and not managing other employees. The hotel "failed to take any active steps to ascertain the dictates of the FLSA." *Elghoural v. Vista JFK, LLC* (2nd Cir 2020). Many employers make the mistake of thinking that if "everyone else" classifies certain positions as salaried/exempt then it must be OK. First, perhaps other companies actually did an assessment of the duties; just because the position has the same title does not mean that it has the same scope as the other company. Even if it is "industry standard," that does not mean it is OK. Whole industries have been targets of DOL's wage and hour audits and been found out of compliance. Do your own assessment of salaried positions and do not rely on what "everyone else does."

Judge Rejects Wage & Hour Settlement with Class of Chipotle Employees – Won't Even Buy Them a Burrito. A judge has rejected the proposal by attorneys for Chipotle restaurant and attorneys for a class of several thousand low wage workers who claim regular denial of pay due. The attorneys for the class of workers proposed accepting a settlement of $3 million. The judge noted that this could net the attorneys a good amount of attorneys' fees, but would give each class member only a "token payment of about $6.00, which would not even buy a burrito" at Chipotle. The judge noted that the average pay to each worker in similar cases was over $860, and the low wage workers were unsophisticated and the Court had an "independent obligation" to assure settlements were fair to the class. The judge directed the parties to try

harder at a settlement. *Turley et al. v. Chipotle Services LLC et al.* (S.D. of Cal, 2020).

DEFAMATION

Curb Your Anger – Waitress's Social Media Campaign Over Paycheck Clerical Error Results in Defamation Suit. Many employees are upset when there is an error in pay. Most use the internal correction process, the Safe Harbor policies advocated by the DOL. Some, though, become angry, even enraged, jump to conclusions of evil intent and fraud. In *Gateway Grill, Inc., et al. v. Davenport* (Allegheny Co. Ct., PA, 2020), there was a clerical error made by the restaurant's 3rd party payroll processing vendor. This resulted in a significantly low paycheck. Other employees brought this to management's attention and new paychecks were soon issued. According to the case, "for some inexplicable reason, Davenport commenced a widespread online campaign designed to defame Gateway Grill and destroy its business and professional reputation." Among other things, she accused the owners of misappropriating servers' tips; she was "letting the people know" about fraud and misappropriation and "extorting thousands of dollars from the entire female staff." These messages were widely disseminated in the area served by the restaurant and harmed its business. A soon-fixed innocent pay error may result in a very much larger liability for the angry employee. Be aware that the waitress's complaints, including angry conclusionary accusations, could be "protected activity" if they had been made under the company's Safe Harbor Pay Correction policy, or filed with DOL or a state wage claim agency. Going outside these channels on social media can remove this protection.